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Effective participation in criminal proceedings: principle and practice

Recent cross-jurisdictional research examined the meanings and functions of, and barriers to, 'effective participation' by court users.

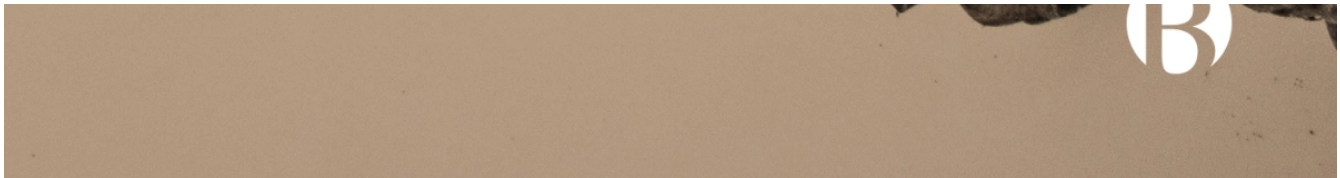
BRISTOL **SHORTS** RESEARCH

PARTICIPATION IN COURTS AND TRIBUNALS

Concepts, Realities and Aspirations

EDITED BY

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Jessica Jacobson is Professor of Criminal Justice at the Institute for Crime & Justice Policy Research (ICPR), Birkbeck, University of London. Her research interests span many aspects of the criminal and wider justice system, and she has researched and published on such topics as prisons, youth offending, sentencing, criminal advocacy, and public experiences of the justice system. As Director of ICPR, she also oversees the institute's programme of academically-grounded, policy-oriented research.

It is a long-established legal principle in England and Wales that people should be able to **participate effectively** in the court and tribunal proceedings that directly concern them. And yet the concept of participation is poorly defined in law and under-explored in legal research and analysis.

In criminal proceedings, the defendant's exercise of their Article 6 right to a fair trial rests, in part, on their capacity to participate effectively, while the criteria for determining fitness to plead also support the principle of effective participation. Fair trial rights are not generally regarded as extending to complainants and other witnesses in criminal hearings: rather, support in law for their participation is largely framed in terms of improving the quality of the evidence they give in court. This, for example, is the main aim of the 'special measures' provisions introduced by the Youth Justice and Criminal Evidence Act 1999, whereby witnesses identified as vulnerable can give evidence from behind a screen, via live video-link, with assistance from an intermediary, or with other specified forms of help. More broadly, the [Criminal Procedure Rules 2020](#) require the court, in preparing for trial, to 'take every reasonable step ... to facilitate the participation of *any person, including the defendant*' (para 3.8(3)(b); emphasis added).

But what exactly does it mean for a defendant or witness to participate effectively in criminal proceedings? This question was addressed in a recent cross-jurisdictional study, conducted by the [Institute for Crime and Justice Policy Research](#) (ICPR) at Birkbeck, University of London, and funded by the [Nuffield Foundation](#). As well as the criminal courts (both Crown and

Magistrates'), the study encompassed the Family Court and some tribunals; the research entailed policy analysis, courtroom observations, and interviews with justice practitioners including judges, lawyers, court staff and providers of support services.

The interviewed justice practitioners shared a general commitment to the principle of participation: arguing that justice could not be achieved in its absence and, moreover, frequently emphasising their own respective roles in helping court users to participate. In discussing participation, they did not draw upon ready-made or precise definitions of the concept, but rather articulated it in a range of ways. Six contrasting conceptualisations of what court users' participation **entails** could be identified in practitioners' accounts:

- Providing or eliciting information for the court;
- Being informed, such that they have understand the court process and outcomes;
- Having legal representation;
- Being protected: that is, not being exposed to excessive fear, distress or discomfort;
- Being managed in such a way that they do not disrupt the court process;
- Being present at proceedings.

The **functions** of court users' participation were likewise described in various ways, among which the prominent themes were that:

- Participation is, in and of itself, the exercise of one's legal rights;
- Court decision-making depends on the information provided or elicited by participating court users;
- Court users who participate and thus have a 'voice' in proceedings are more likely to view the court process and outcomes as legitimate;
- Participation potentially offers therapeutic benefits to court users.

From the courtroom observations conducted for the study, it was clear that the nature of court user participation varies according to the judicial setting, type of hearing, and the court user's role or legal status. For example, the part a defendant might play in a criminal trial necessarily differs from that of a prosecution witness appearing in the case; while the scope of participation by a parent in a contested care hearing in the Family Court, or a claimant in an Employment Tribunal hearing, is very different again. Nevertheless, there were many commonalities to participation which cross-cut the jurisdictional and other divides. Most notably, almost every

case had at its heart a **story of conflict, loss and disadvantage**; and each court user's 'participation' was, in effect, a process by which they told, or had told on their behalf, their own version of that story. This process was facilitated by courtroom professionals and practitioners who were, very predominantly, courteous, kind and respectful in their dealings with court users.

However, the observed court proceedings did not simply entail the **telling** of court users' stories, but also – necessarily – their **translation into legal questions and legal answers** in order that decisions could be made and judicial outcomes achieved. And it was apparent that this process of translation was also a process of disempowerment. The formality and complexity of court language, concepts and structures, and above all the power differentials they embodied, had the effect of marginalising and silencing court users and, ultimately, disconnecting them what was going on around them.

Over recent years, the [HMCTS court reform programme](#) has introduced many policy changes with the stated aim of 'building a modern system for administering justice which will benefit everyone who uses it'. Notwithstanding a continuing focus within the programme on access to justice, aspects of the reforms have created potential *new* barriers to effective participation: particularly, the wide-scale court closures and accompanying expansion of remote and online proceedings. At the same time, availability of legal advice and representation has been severely impacted by sweeping cuts to legal aid. Today, the Covid-19 pandemic – which has given rise to large case backlogs and rapidly accelerated the trend towards 'virtual justice' – adds far greater urgency to the task of developing and implementing a principled approach to supporting participation. Such an approach should be based on a clear understanding of what exactly participation means, why it matters, and what can be done to ensure it is genuinely effective across all judicial settings. The findings of ICPR's research will, it is hoped, significantly advance this understanding.

The findings of the study are published in the book [Participation in Courts and Tribunals: Concepts, Realities and Aspirations](#) (editors Jessica Jacobson and Penny Cooper), available from Bristol University Press and as an [open access e-book](#). A [policy briefing](#) and [practitioner toolkit](#) based on the study findings are also available.

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